MOTION FILED

DEC 16 1992

No. 92-908

In the
Supreme Court of the United States

October Term, 1992

Mike Caplinger and Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS

MOTION TO APPEAR AS AMICI CURIAE AND BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GWENDOLYN H. GREGORY
Counsel of Record
Deputy General Counsel
Natl. School Boards Assoc.

1680 Duke Street
Alexandria, VA 22314
(703) 828-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

IVAN B. GLUCKMAN
General Counsel
Natl Assoc. of Sec. School Prin.
1904 Association Drive
Reston, VA 22091
(703) 860-0200

No. 92-908

In the

Supreme Court of the United States

October Term, 1992

Mike Caplinger
and
Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

MOTION OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
AND THE NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS
TO APPEAR AS AMICI CURIAE
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) and the National Association of Secondary School Principals (NASSP) move this Court for leave to participate as Amici Curiae herein, for the purpose of filing the attached brief in support of the Petition for

Writ of Certiorari. Petitioners have consented to the filing of the brief. Petitioners' letter of consent is on file with the Clerk of this Court. Respondent has refused to consent. Letter of refusal is on file with the Clerk of this Court.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

NASSP is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid

in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school administrators in failing to protect students. Given the perceived "deep pockets" of school districts and their administrators, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." Amici believe that it is critical to the efficient conduct of

public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be made the insurer of student well-being, under strained interpretations of civil rights law. Furthermore, state tort laws are adequate to provide a remedy to students where injuries result from gross negligence of school officials.

The National School Boards Association and the National Association of Secondary School Principals urge this Court to grant them leave to present their views.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
(NSBA)

1680 Duke Street
Alexandria, VA 22314
(703) 828-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

IVAN B. GLUCKMAN
General Counsel
National Association of Secondary School
Principals
1904 Association Drive
Reston, VA 22091
(703) 860-0200

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

REASONS FOR GRANTING THE WRIT 4

ARGUMENT 5

Introduction 5

I. The court below and numerous other federal courts have misapplied this Court's decisions by imposing strict liability on school districts and their supervisory employees for injuries to students 8

A. There is no substantive due process right implicated in this case 8

1. Historically, this Court has applied the substantive due process analysis sparingly to protect interests which are in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice 8

2. The openness of the schools make it unnecessary to apply the same constitutional standards used for prisons and mental institutions. 12

3. The Rochin v. California analysis has been reserved by this Court for criminal cases and is inappropriate for use in determining liability of school districts and school supervisors for the conduct of subordinates in pursuit of the latter's personal heinous objectives . . . 19

B. This Court has never applied the "deliberate indifference" standard outside the context of the Eighth Amendment . . . 21

1. Insurance companies are refusing to cover the alleged "intentional" conduct of school district administrators in these cases and therefore these administrators are at high personal risk even to defend themselves against suit. 30

II. Students' liberty rights to bodily integrity are adequately protected through state tort law, without the necessity of expanding substantive due process to include such a right 32

Conclusion 33

TABLE OF AUTHORITIES

page

CASES:

Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982) 10

City of Canton v. Harris, 489 U.S. 381 (1989) 27

Collins v. Harker Heights, 112 S.Ct. 1061 (1992) 27

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 5, 14, 15

Dorothy J. v. Little Rock School Dist., 794 F.Supp. 1405 (E.D. Ark. 1992) . . . 25

Estelle v. Gamble, 429 U.S. 97 (1976) 5,21

Griswold v. Connecticut, 381 U.S. 479 (1965) 8

Ingraham v. Wright, 430 U.S. 651 (1977) 5, 17, 22, 23

J.O. v. Alton Community Unit School Dist., 909 F.2d 267 (7th Cir. 1990) 23

Jane Doe A. v. Special Sch. District, 901 F.2d 642 (8th Cir. 1990) 24

Lopez v. Houston, 817 F.2d 351 (5th Cir. 1987) 24

Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992) 25

Meyer v. Nebraska, 262 U.S. 390 (1923) . 9

Pagano v. Massapequa Public Schools, 714 F.Supp. 641 (E.D. N.Y. 1989) . . . 25

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 10

Rochin v. California, 342 U.S. 165 (1952) 5, 19

Russell v. Fannin County School Dist., 784 F.Supp. 1576 (N.D. Ga. 1992) . . . 25

Simescu v. Emmet County Dept. of Social Services, 942 F.2d 372 (6th Cir. 1991) 24

Stoneking v. Bradford Area School Dist. (Stoneking I), 856 F.2d 594 (3rd Cir. 1988), vacated and remanded, 109 S.Ct. 1634 (1989) 16, 17

Stoneking v. Bradford Area School Dist. (Stoneking II), 882 F.2d 720 (3rd Cir. 1989), cert. denied, 110 S.Ct. 840 (1990) 22

Thelma D. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991) 24

Wilson v. Seiter, 111 S.Ct. 2321 (1991) 31

Wood v. Strickland, 420 U.S. 315 (1975) 9

Youngberg v. Romeo, 457 U.S. 307 (1982) 5, 12, 26

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution,
Eighth Amendment . . . . . passim

U.S. Constitution,
Fourteenth Amendment . . . . . passim

42 U.S.C. § 1983 . . . . . passim

Tex. Educ. Code Ann.
§§ 21.912(b), .914 (1987);
Tex. Civ. Prac. & Rem. Code
§ 101.021, .051 (1986) 32

OTHER AUTHORITIES:

Letter to August W. Steinhilber,
General Counsel, National School
Boards Association from Jan Pacey,
Vice President, Forrest T. Jones
& Company, Inc. on behalf of
National Union Fire Insurance
Company, (Dec. 8, 1992) 30

No. 92-908

In the

Supreme Court of the United States

October Term, 1992

Mike Caplinger
and
Eddy Lankford,
Petitioners,

v.

Jane Doe,
Respondent.

BRIEF AMICI CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AND NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the

nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school personnel in failing to protect students. Given the perceived "deep pockets"

of school districts and their supervisory employees, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." Amici believe that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability for the injury which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

The implications of the decision in this case are vast, given the fact that the analysis used by the lower court in the case at bar is also being followed by numerous other courts, holding school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions which, if true as alleged, were nothing more than negligent.

The substantive due process issue is very complex and many lower courts do not even attempt to develop a cogent analytical base for their decisions, making it difficult for

schools and their counsel to follow the cases in developing a legal defense. Courts use substantive due process as a constitutional "catch all" to hold schools liable under Section 1983 for injuries to students which do not fall neatly into explicit constitutional niches. In effect, lower courts are expanding beyond their bounds this Court's rulings in Ingraham v. Wright, 430 U.S. 651 (1977), Estelle v. Gamble, 429 U.S. 97 (1976), Youngberg v. Romeo, 457 U.S. 307 (1982), DeShaney v. Winnebago, 489 U.S. 189 (1989), and Rochin v. California,342 U.S. 165 (1952), to make schools strictly liable for injuries to students.

As noted by the Petitioners, there is also a conflict in the circuits on the question of whether schools fall into the "functional custody" category of Youngberg v. Romeo.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. Amici and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, Amicus NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse; State laws that require

> reporting of suspected child abuse should also grant immunity for liability for reports made in good faith.
>
> School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA runs training programs for school board members and administrators and for school board attorneys on the important policy and legal issues raised in this case. NSBA and its Council of School Attorneys have also published a number of monographs and articles on the subject of prevention of child abuse and other injuries to school children.

The lower court's zeal to compensate Petitioners for the devastating injury to her is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public

employee. The lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the Constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the context of Eighth Amendment violations.

I. The court below and numerous other federal courts have misapplied this Court's decisions by imposing strict liability on school districts and their supervisory employees for injuries to students.

A. There is no substantive due process right implicated in this case.

1. Historically, this Court has applied the substantive due process analysis sparingly to protect interests which are in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The substantive due process doctrine has been applied in a very limited fashion to include fundamental rights expressly enumerated in the Constitution such as the first amendment rights of free speech and assembly and free exercise of religion; interests which are in the penumbra of enumerated rights such as the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives) which is in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In Wood v. Strickland, 420 U.S. 315 (1975), the court of appeals found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." Moore v. City of East Cleveland, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing

> Poe v. Ullman, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

The lower court in the instant case makes the assumption that the right to a public school education includes a substantive due process component. That assumption has no historical basis in the Constitution itself or in this Court's decisions interpreting it.

2. The openness of the schools make it unnecessary to apply the same constitutional standards used for prisons and mental institutions.

The lower court decision is based on the premise that the public schools are akin to prisons and mental institutions. The court cites Youngberg v. Romeo, 457 U.S. 307 (1982), in support of its holding.

Youngberg involved the question of state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure his safety and to

facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." [Emphasis supplied.] 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be "confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other

administrators and teachers. Compulsory attendance laws are not sufficient to give rise to an automatic finding of confinement for purposes of the Constitution.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a feeling that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which she cannot extricate herself? In this case,

the answer to that question has to be in the negative.

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), this Court emphasized the necessity of affirmative state restraint on individual freedom to substantive due process analysis. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury.

The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The Court noted, 489 U.S. at 201 n. 9, that it was expressing no view on the question of whether its decision would be different had the child been placed by the state in a foster home operated by agents of the state. In the case at bar, the lower court cited that footnote in announcing its holding that compulsory school laws have the effect of placing students in the custody of the state. (The Fifth Circuit so held, despite the fact that the injuries of which Respondent complains occurred outside the compulsory environment of the school).

The Fifth Circuit's holding reflects a development in the lower courts giving students similar substantive rights to

prisoners and involuntarily incarcerated mental patients on the premise that compulsory attendance laws place students in the "functional custody" of the state. For example, in Stoneking v. Bradford Area School District (Stoneking I), 856 F.2d 594 (3rd Cir. 1988), vacated and remanded, 109 S.Ct. 1634 (1989), the Third Circuit held that female students in a public school have a constitutional right to be free from sexual abuse by a school employee and that the "special relationship" between the students and the school districts based on the state's compulsory attendance laws gives rise to a duty to investigate the allegations and to take steps to protect the students. This Court vacated and remanded that decision in light of DeShaney. On remand, the court reached the same conclusion but without using the "special relationship" analysis. (See discussion, infra at 22).

The premise of Stoneking I derives from the erroneous view that this Court established a substantive right to be free from physical abuse in school in Ingraham v. Wright, 430 U.S. 651 (1977). That case raised the issue of whether excessive corporal punishment in the schools implicates the Eighth Amendment's proscription against cruel and unusual punishment. The Court held that, unlike prisoners, injured parties in the public schools have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. at 670.

The Court agreed that students have a liberty interest in bodily integrity which is protected by procedural due process, but the Court explicitly stated that it was not ruling on the question of whether substantive due

process is implicated by excessive corporal punishment. It should be noted that a much stronger case could be made for arguing that corporal punishment implicates substantive due process, given the fact that the actions are officially sanctioned while the sexual abuse at issue here is purely in furtherance of the personal objectives of the perpetrator, and against specific school policies. Nevertheless, the "openness of the schools" argument should still prevail to differentiate students from prisoners and nothing in Ingraham supports the contention that student have a substantive right in their bodily integrity.

3. The Rochin v. California analysis has been reserved by this Court for criminal cases and is inappropriate for use in determining liability of school districts and school supervisors for the conduct of subordinates in pursuit of the latter's personal heinous objectives.

The court below cites Rochin v. California, 342 U.S. 165 (1952), for the proposition that "a state actor [cannot] use means which 'shock the conscience' in the name of the public good." No one, including Respondents, is arguing here that the teacher/coach was acting "in the name of the public good," when he injured the Petitioner. The acts were committed strictly in furtherance of his own nefarious ends.

A number of courts have cited Rochin to support a finding of a constitutional tort where a school employee's actions were so outrageous as to "shock the conscience" of the court. It takes a tremendous leap from Rochin and the criminal cases following it to a case such as that at bar where the employee's conduct is in furtherance of his personal interests and in direct conflict with the interests of the state. That does not make the acts themselves any less unconscionable, but it does call into question the court's

action in holding the state responsible for the acts.

There may be a fact situation where it would be appropriate to hold the school officials liable for conduct which "shocks the conscience," where the school, "in the name of the public good," officially imposes punishment on children which is "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172. But those facts are not before the Court in this case.

B. This Court has never applied the "deliberate indifference" standard outside the context of the Eighth Amendment.

The lower court remanded the case at bar to the trial court for a finding on the question of whether the school officials "acted with deliberate indifference toward Jane Doe's firmly established constitutional rights [to be free from sexual molestation by a state-employed schoolteacher] . . . ."

The "deliberate indifference" standard for holding the state liable for tortious injuries to individuals was first announced by this Court in Estelle v. Gamble, 429 U.S. 97 (1976). That case held that the state violates the Eighth Amendment's proscription against cruel and unusual punishment where it is "deliberately indifferent" to the "serious" medical needs of a prisoner. This Court has never applied the "deliberate indifference" standard outside the context of the Eighth Amendment cases. Yet numerous lower court cases are applying that standard to hold school districts liable for injuries to students even though this Court has held that the Eighth Amendment does not apply to schools. Ingraham v. Wright.

The leading school case in which that standard was applied is the second Stoneking case, Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989), cert. denied 110 S.Ct. 840 (1990). After this Court vacated

and remanded Stoneking I in light of DeShaney, the Third Circuit Court of Appeals mused that it had the option of continuing to rest its decision on a duty to protect arising out of the "special relationship" created by the state's compulsory education laws. However, because of the "uncertainty of the law in this respect," the court instead ruled that the officials acted with "deliberate indifference" to the constitutional rights of the students through a custom that communicates condonation of the behavior. The court again erroneously cited Ingraham v. Wright for the proposition that students have a substantive right to be free from sexual molestation.

Lower courts usually apply the "deliberate indifference" standard to hold school districts and supervisory employees liable in cases brought by students against their schools for damages under Section 1983 as the result of tortious conduct by school employees or other students. Even those cases

which do not reach the question of whether there is a constitutional right to bodily integrity in the schools, apply the deliberate indifference standard in determining whether supervisory employees and the school district itself can be held liable under Section 1983 for assaults on students.

In J.O. v. Alton Community Unit School Dist., 909 F.2d 267 (7th Cir. 1990), although holding that compulsory school attendance laws do not render students unable to care for themselves to the extent that an "affirmative duty to protect that individual arises," the court nevertheless ruled that plaintiffs should be allowed to amend their complaint to allege that the school was deliberately indifferent to the safety of students because school policies "encourag[ed] a climate to flourish where innocent [children] were victimized." Plaintiffs in that case are seeking review of the decision by this Court. See also Jane Doe A. v. Special Sch. District,

901 F.2d 642 (8th Cir. 1990); Simescu v. Emmet County Dept. of Social Services, 942 F.2d 372 (6th Cir. 1991); Thelma D. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991).

The standard has also been employed in cases involving assaults upon students by other students. The court below cites Lopez v. Houston, 817 F.2d 351 (5th Cir. 1987), in support of its ruling. In that case the court held that, although there was no evidence that the school district's training program was sufficiently lacking to rise to the level of "deliberate indifference," the school bus driver could be held liable for his failure to protect the plaintiff from attacks by other students on the school bus if he was "grossly negligent or deliberately indifferent." Similarly, in Paganc v. Massapequa Public Schools, 714 F.Supp. 641 (E.D. N.Y. 1989), the court held that the school district's failure to take preventive steps to protect a student from verbal and physical abuse by other

students rose to the level of "deliberate indifference." Contra Dorothy J. v. Little Rock School Dist., 794 F.Supp. 1405 (E.D. Ark. 1992), Russell v. Fannin County School Dist., 784 F.Supp. 1576 (N.D. Ga. 1992). Finally, in Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), plaintiff claims that a teacher's failure to supervise and the principal and superintendent's "deliberate indifference" to training and supervision requirements, resulted in the strangulation of a student in an unattended cloakroom adjacent to the teacher's classroom. Plaintiffs in that case are also petitioning this Court to review their case.

Neither the lower court nor any of the other courts which have applied the "deliberate indifference" standard to schools have offered an explanation as to how they made the exponential leap from the Eighth Amendment to the non-criminal context. Certainly this Court has never made that leap.

The Court had occasion to rule directly on this question in Youngberg v. Romeo. In that case the Court ruled that although the state owes a duty to incarcerated mental patients to provide safe conditions, the trial court erred in its use of the "deliberate indifference" standard in its instruction to the jury.

> The "deliberate indifference" standard was adopted by this Court in Estelle v. Gamble, [citations omitted], a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to Estelle v. Gamble in charging the jury, it erroneously used the deliberate indifference standard articulated in that case.

457 U.S. at 312, n. 11.

In City of Canton v. Harris, 489 U.S. 381 (1989), this Court expanded the "deliberate indifference" standard to include inadequate training of police officers and courts are now misapplying City of Canton and other Section 1983 cases to hold school districts liable for

tortious acts of employees. The court below, for example, erroneously cites Collins v. Harker Heights, 112 S.Ct. 1061, 1069 (1992), for the proposition that "'deliberate indifference' in training employees provides the necessary causal link to hold a municipality liable for the torts of its employees." Petition for Cert., Caplinger v. Doe, at page A-16. That, of course, was not the holding in that case; in fact the reference to inadequate training cited by the Fifth Circuit comes from the Plaintiff's complaint in Harker Heights, not from the decision of the Court. The Court actually ruled that, under the circumstances of the case, no constitutionally protected right was implicated and, therefore, the Court had no occasion to determine whether the attribution of liability principles of Estelle and City of Canton should be extended beyond the context of the Eighth Amendment. Where courts hold that there is a substantive

constitutional right to bodily integrity in the schools and a corresponding duty to protect the student, the ruling in Canton leaves open the door to lawsuits making a "federal case" out of any injury in the schools, from assaults by students on students or employees; injuries resulting from defective equipment (athletic, shop etc.) or defective facilities; injuries allegedly resulting from inadequate supervision. Any state tort action can thus be transformed into a constitutional case.

If, indeed, there is a "special relationship" between students and schools which amounts to a duty to provide all means of protection of the student, a proposition with which Amici vehemently disagree, so as to give rise to a constitutionally protected right to safe schools -- that still does not legitimize the ruling of the court below or, indeed, the rulings of most of the lower courts on this subject. In order to violate

the constitutional right it would seem that the state would have to knowingly place children in an unsafe environment from which the student cannot extricate himself. The presence of one degenerate in a school would not seem to be sufficient to rise to constitutional proportions, particularly when the alleged incidents occurred while the student was outside the mandated environment of the school.

1. Insurance companies are refusing to cover the alleged "intentional" conduct of school district administrators in these cases and therefore these administrators are at high personal risk even to defend themselves against suit.

School districts and administrators across the country are finding it difficult, if not impossible, to find insurance to cover the kind of allegations involved in this case. Recently, an insurance carrier that provides errors and omissions coverage to over 6000 school districts across the country, announced

that it will no longer cover this type of case in their "standard" policy without "massive rate increases." Letter to August W. Steinhilber, General Counsel, National School Boards Association from Jan Pacey, Vice President, Forrest T. Jones & Company, Inc. on behalf of National Union Fire Insurance Company, (Dec. 8, 1992). Furthermore, because complaints in cases such as the one at bar allege Constitutional violations rather than state torts, the general liability policies do not cover these types of allegations.

This Court has stated that the Eighth Amendment cases, in determining "deliberate indifference," "mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." Wilson v. Seiter, 111 S.Ct. 2321, 2325 (1991). However, the school decisions that use this term use it as a substitute for "gross negligence" which does not require a particular state of mind.

Plaintiffs allege "deliberate indifference" rather than "gross negligence" merely in order to get into federal court and courts follow their lead. Thus, because of the language of the pleadings, rather than the nature of the conduct of its employees, school districts and school administrators are being forced to pay their own costs in defending these cases, and they often settle to save defense costs, even where the case is deemed to be frivolous.

II. Students' liberty rights to bodily integrity are adequately protected through state tort law, without the necessity of expanding substantive due process to include such a right.

Most states have statutorily waived the immunity of school districts from suit for the grossly negligent acts of public employees resulting in physical injury to students. Individual school employees probably would not be immune from liability if sued in their individual capacity even in those states where sovereign immunity has not been waived.

In the event that a case arises where the state does not permit a cause of action for gross negligence of a public official which implicates a student's liberty interest in bodily integrity, the Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process. But that is not a valid reason for converting the liberty interest into a substantive due process right.

CONCLUSION

The holding below is a substantial departure from the decisions of this Court which are cited in its support. School districts and school administrators across the country need guidance from this Court on these important issues.

Amici urge this Court to review this case.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
Natl School Boards Assoc.

1680 Duke Street
Alexandria, VA 22314
(703) 828-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A SHANNON
NSBA Executive Director

IVAN B. GLUCKMAN
NASSP General Counsel
1904 Association Drive
Reston, VA 22091
(703) 860-0200